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No. 84-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARK LANDSBERG,

Petitioner,

VS.

SCRABBLE CROSSWORD GAME PLAYERS, INC.; SELCHOW & RIGHTER, CO.; AND CROWN PUBLISHERS,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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3 Nimmer on Copyright § 13.03[A] (1984 ed) 8

I. INTRODUCTION

Respondents, Scrabble Crossword Game Players, Inc., Selchow & Righter Company and Crown Publishers, Inc., who were the defendants in the district court and appellants in the court of appeals, have no substantive dispute with those portions of the petition entitled, Opinion Below, Jurisdiction, and Constitutional and Statutory Provisions. They have definite and overwhelming objection to petitioner's Statement of the Case and Statement of Facts. Indeed, the latter exalts the district judge's findings above the court of appeal's decision. Perhaps the reason that petitioner Landsberg likes those findings is that they were prepared by his counsel, and wholeheartedly adopted by the trial court.

II. STATEMENT OF THE CASE

This case, the first complaint in which was filed in 1976, will not be reviewed in excruciating detail. With extreme brevity, respondent Selchow & Righter Company makes and sells the Scrabble-brand crossword game. In 1972 the petitioner, Mr. Landsberg, sent Selchow & Righter's public relations subsidiary, Scrabble Crossword Game Players, Inc., a copy of an unpublished manuscript ostensibly prepared by Mr. Landsberg. That manuscript has never found a publisher. It contains but 25 pages of actual copy. Mr. Landsberg sent Scrabble the manuscript to see if respondents had any objection to Landsberg's use of the trademark SCRABBLE therein.

Respondents had been considering the preparation of an updated replacement for its 59-page volume entitled, How To Win At Scrabble, published in 1955. After receiving Landsberg's unsolicited manuscript, some sporadic negotia-

tions ensued regarding Mr. Landsberg's authoring a new version of How To Win At Scrabble. Those negotiations broke down, and Scrabble Crossword Game Players, Inc. employed a recognized Scrabble crossword game authority to prepare its own book, which was subsequently published under the title, Scrabble Players Handbook.

The accused Scrabble Players Handbook is 146 pages in length, replete with photographs, and is completely dissimilar in appearance—and respondents submit in content—to the scanty manuscript Mr. Landsberg sent to respondents. There was never a question of access: respondents admitted access. So, the only issue was substantial similarity.

III. THE COURT OF APPEALS HOLDING REGARDING SUBSTANTIAL SIMILARITY

A unanimous decision of the U.S. Court of Appeals was rendered on March 5, 1984 and is found in Appendix A (A-1 to A-13) bound with the Petition. Commencing at A-4, the court of appeals carefully and at length considered the question of infringement, and particularly whether there was substantial similarity between the works. With citation to prior decisions of this Court, the U.S. Courts of Appeals for the Ninth, Second and Fifth Circuits, state courts and an authority on the copyright law, the court of appeals determined that between Landsberg's manuscript and respondent's Scrabble Players Handbook there was no substantial similarity, saying at A-8:

> While we find similarities between the two works, we think there is no more than the similarity than must unavoidably be produced by anyone who wishes to use

and restate the unprotectable ideas contained in Landsberg's work. If we were to hold S&R's work to be an infringement, we do not see how anyone could state Landsberg's ideas without also being held to have infringed. Landsberg would in effect have obtained a copyright on the ideas contained in his work.

* * *

S&R's work does not duplicate the selection, coordination, and arrangement of the ideas in Landsberg's work, so we need not decide whether a work that rephrased in the same order as the original a substantial part of the ideas in another work might be held to infringe that work as a compilation, *see* 17 U.S.C. §§ 101, 103, even though none of the rephrasings of the individual ideas would constitute infringement when viewed in isolation.

IV. PETITIONER'S REASONS FOR THIS COURT'S GRANTING CERTIORARI ARE INAPT

Petitioner urges that certiorari should be granted because the court of appeals fashioned a new rule of law for works of nonfiction, which petitioner calls the "verbatim rule" and which, avers petitioner, would virtually exclude factual works from copyright protection. According to petitioner, the court of appeals "for the first time" has established this "verbatim rule." Further, says petitioner, other circuits do not have any such verbatim rule.

Petitioner is in error on two counts: (1) there was no "verbatim rule" established by the Ninth Circuit and (2) other circuits certainly do recognize that there is a difference in adjudicating substantial similarity when consid-

ering factual and nonfactual works. This distinction springs from the recognition that in factual works dealing with the same subject matter, there must of necessity be some similarity of expression, since the non-protectable ideas on which the expressions are based are often the same.

A. No Verbatim Rule Was Established By the Ninth Circuit Court of Appeals

In petitioner's Questions Presented, an attempt is made to create a false issue, *i.e.*, the asserted utilization of a new legal standard for a determination of infringement of factual versus nonfactual works. Contrary to petitioner's assertion, the appellate court used the universal and established legal standard in the assessment of copyright infringement—ownership of a right, access to the accusing work, and a comparative assessment of the substantial similarity of the expressions of ideas in the subject works. *Sid & Marty Krofft Television Productions, Inc.* v. *McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

The petitioner suggests the appellate court has fashioned a new test for the assessment of substantial similarity between nonfactual works: the contrived "verbatim rule." The appellate court did not establish a verbatim rule; it merely outlined existing discretionary parameters for evaluating substantial similarity in various types of works on a case-by-case basis.

A primary fact to bear in mind in this copyright infringement action is that the works at issue both relate to common factual subject matter, *i.e.*, tactics and strategies for playing respondents' SCRABBLE crossword game. Recognizing the commonality of factual subject matter for the works at issue, the Ninth Circuit stated, "Subsequent authors wish-

ing to express the ideas contained in a factual work often can choose from only a narrow range of expression" [A-6]. Then, quoting from *Nimmer on Copyright*, it made the statement which forms the entire basis for the Petition:

> Therefore, similarity of expression *may* have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed. [A-7] [emphasis supplied]

The petitioner attempts to create an issue herein by conversion of the discretionary language used by the appellate court to the purported "verbatim rule." This deft, albeit self-servingly erroneous, conversion is evidenced at page 3 of the Petition;

> The Court of Appeals for the Ninth Circuit reversed, holding that "similarity of expression *may* have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed." (A-7). Based on its review of the two works involved the Court of Appeals concluded that there was not the *requisite* verbatim reproduction or very close paraphrasing necessary for infringement of a "factual" work. (A-8) [emphases supplied]

A like modification of the discretionary language of the appellate court decision appears at page 9 of the Petition:

> By fashioning a rule of law for works of nonfiction *requiring* verbatim or near verbatim copying of expression . . ." [Emphasis supplied]

This attempted refashioning of the appellate court decision to create an imagined conflict in the circuits does not past

even cursory analysis of the case law and review of subsequent portions of the appellate court opinion.

The appellate court concluded that the degree of similarity between the works was an "unavoidable consequence" of the commonality of the subject matter. However, it did not limit its review to substantial similarity in expression or rephrasing of the expressions of the subject works, *i.e.*, the purported verbatim rule. It separately reviewed the selection, coordination, and arrangement of the accused work as a second possible basis to support a finding of substantial similarity and concluded:

> [Respondents'] work does not duplicate the selection, coordination, and arrangement of the ideas in [petitioner's] work, so we need not decide whether a work that rephrased in the same order as the original a substantial part of the ideas in another work might be held to infringe that work as a compilation, *see* 17 U.S.C. §§ 101, 103, even though some of the rephrasings of the individual ideas would constitute infringement when viewed in isolation. [A-8]

The court below tried to find some basis to support the district court's holding of copyright infringement—and failed.

B. The Ninth Circuit Followed Established Precedent for Analysis of Substantial Similarity for Factual Works, and, Analogously, Scenes A Faire

The appellate court merely recognized the obvious. For fictional works having an infinite variety of expressions, and factual works having a narrow range of expressions of a

given idea, the closeness of expression requisite to a finding of substantial similarity may vary.

The petitioner specifically recognized this wide discretionary latitude at page 11 of the Petition, stating:

> Every copyrighted work necessarily has a different blend of idea and expression varying from the work in which the idea so dominates that there is no independent expression (Cf., *Herbert Rosenthal Jewelry Corp.* v. *Kalpakian*, 446 F.2d 738 (9th Cir. 1971) to the work of fantasy where the idea provides only the most general theme and all the rest is expression (Cf., *Universal Film Studios* v. *Film Ventures International*, 543 F.Supp. 1134 (C.D. Cal. 1982)).

In the present case, the two texts, both describing how to play respondents' SCRABBLE crossword board game, must have some innocent similarities because they must express many similar ideas. To activate the presumption of copying, greater similarity may be required for factually based works than fictional works. In the latter the author can choose from an infinitely variety of expressions. This similarity may have to rise to the level of verbatim copying or very close paraphrasing if the modes for expression of the common subject matter are narrow.

This variable discretion in the application of the substantial similarity test to factual works is well established and recognized. *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972, 979-980 (2d Cir. 1980); *Wainwright Securities, Inc.* v. *Wall Street Transcript, Corp.*, 558 F.2d 91 (2d Cir. 1977); *Suid* v. *Newsweek Magazine*, 503 F.Supp. 146, 148 (D.C.D.C. 1980); 3 *Nimmer on Copyright* § 2.11[B]. The

rationale for this application of the substantial similarity test to factual works was cogently addressed by the appellate court in its opinion at A-5 to A-7.

Additionally, the appellate court at A-7 discussed the doctrine of *scenes a faire* as "another illustration of how the substantial similarity that constitutes infringement varies according to the idea expressed." This doctrine recognizes that reproduction of an author's expression of stock scenes, or scenes that flow necessarily from common, unprotected ideas, does not constitute infringement. To hold otherwise would give the first author of a stock scene a monopoly on commonplace ideas behind the *scenes a faire*.

The doctrine of *scenes a faire*, as initially promulgated by Judge Yankwich in *Schwarz* v. *Universal Pictures Co.*, 85 F.Supp. 270, 275 (S.D. Cal. 1945), is established precedent, as indicated by the copious notation of cases at 1 *Nimmer on Copyright* § 13.03[A] n. 43, 44. Does petitioner suggest that the appellate court established new law by its reference to this doctrine?

C. Petitioner's Cited Law Supports Respondents' Position

The petitioner has cited a number of cases commencing at page 12 of its Petition in an attempt to demonstrate a conflict among the circuits. Since petitioner has fabricated a new rule of law requiring verbatim copying in copyright actions involving factual works, such a purported conflict would not be surprising. However, petitioner's cited case law utilizes the same discretionary, analytical approach followed by the Ninth Circuit in the instant case.

The first case on which petitioner relies is *Orgel* v. *Clark Boardman Co.*, 301 F.2d 119, 120 (2d Cir. 1962), where the

court noted that two factual texts treating the same subject matter are bound to contain a large measure of innocent similarity. The *Orgel* court found infringement but no verbatim copying, although it did find similarity of phrasing. However, the court then proceeded to a second test of substantial similarity: the selection, coordination and an arrangement of ideas, and held:

> "When the books are read together in continuity the content is so similar in arrangement, in the language and in substance that the conclusion is inescapable that the individual defendant took advantage of his access to the individual's plaintiff's [sic] book in the compilation of the part of his work which dealt with valuation." [301 F.2d 120]

That is precisely what the Ninth Circuit did in the case at bar. At A-8 the Ninth Circuit held:

> S&R's work does not duplicate the selection, coordination, and arrangement of the ideas in Landsberg's work, so we need not decide whether a work that rephrased in the same order as the original a substantial part of the ideas in another work might be held to infringe that work as a compilation, see 17 U.S.C. §§ 101, 103, even though none of the rephrasings of the individual ideas would constitute infringement when viewed in isolation.

Thus, the Second Circuit in *Orgel* and the Ninth Circuit in the present action took precisely the same path in determining substantial similarity or lack thereof.

Nutt v. *National Institute*, 31 F.2d 236 (2d Cir. 1929) cited by Petitioner at Pet. 12, also applies the secondary test of

"plan and arrangement" of the works [31 F.2d at 238], just as the Ninth Circuit did at A-8. There is nothing different in the test for similarity. Likewise in petitioner's citations to *Flick-Reedy Corp.* v. *Hydro-Line Mfg. Co.*, 351 F.2d 546, 548 (7th Cir. 1965) and *Meredith Corp.* v. *Harper & Row Publishers, Inc.*, 378 F.Supp. 686, 690 (S.D.N.Y. 1974), aff'd per curiam, 500 F.2d 1221 (2d Cir. 1974), the respective courts found infringement based upon a usurpation of the structure, topical sequence and arrangement of the works at issue. The same is true in *Schroeder* v. *William Morrow & Co.*, 566 F.2d 3, 6 (7th Cir. 1977), where infringement was found in "selection, ordering and arrangement" of factual matter.

Finally,[1] in *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), the court specifically found that the defendant "appropriated almost verbatim the most creative and original aspects of" the accusing text. The court made a verbatim comparison in determining "substantial similarity" as was done by the Ninth Circuit herein. Is the petitioner asserting the Second Circuit has thereby established a "verbatim rule"? The answer is in the negative. The Second Circuit simply used verbatim comparison as one means to ascertain substantial similarity.

The Petitioner's cited law does not create a conflict among circuits. The analysis undertaken in the Second and Seventh Circuits is precisely the analysis undertaken by the Ninth Circuit in instant action. The Ninth Circuit reviewed

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[1]*Miller* v. *Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981) addressed a different question, *i.e.*, is research copyrightable.

the subject works for the best evidence of substantial similarity, *i.e.*, verbatim copying or close paraphrasing. Finding none, the court analyzed the works for structural and organizational content and concluded that respondent's work did not duplicate the selection, coordination and arrangement of ideas in the accusing work. Petitioner's disagreement with a holding of lack of copyright infringement is not a proper basis for the grant of certiorari.

V. CONCLUSION

The petition for issuance of a writ of certiorari should be denied.

Respectfully submitted,

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